

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

L. D. FUSE, JR.,

Defendant-Appellant.

UNPUBLISHED

October 13, 2009

No. 285169

Berrien Circuit Court

LC No. 2007-405905-FH

Before: Servitto, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of resisting and obstructing a police officer, MCL 750.81d(1). He was acquitted of disturbance of lawful meetings (disturbing the peace), MCL 750.170. Defendant was sentenced to a \$300 fine and costs of \$1,120 or 60 days in jail. Because defendant was not denied his right to a jury drawn from a fair cross-section of the community, his right to the effective assistance of counsel, or his right to confront witnesses and present a defense, we affirm.

In November 2007, police and firefighters responded to a fire at a home occupied by defendant. Defendant was not home at the time of the fire, but apparently arrived on the scene while firefighters were attempting to control the blaze. Defendant attempted to enter the home but was grabbed by police officers and ordered to stay back. Defendant refused to comply with several commands to stay away from the burning home, pulling away from the police officers and continuing toward the home. One officer ultimately used a taser on defendant to stop him from getting closer to the home and defendant was thereafter arrested.

Defendant first argues that he was deprived of the right to an impartial jury drawn from a fair cross section of the community. Preserved issues involving the systemic exclusion of minorities in jury venires are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996). To establish a prima facie violation of the fair cross-section requirement, the defendant bears the burden of proving “(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and, (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process.” *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

Here, defendant has failed to establish the second and third prongs of the test. His only evidence of underrepresentation was his own observation of his own jury array, which contained only two African-Americans. Defendant did not present evidence of underrepresentation for jury venires in general. “Merely showing one case of alleged underrepresentation does not rise to a ‘general’ underrepresentation that is required for establishing a prima facie case.” *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000). In addition, defendant has failed to establish systematic exclusion of minority jurors. “[S]ystematic exclusion cannot be shown by one or two incidents of a particular venire being disproportionate.” *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). Defendant provided no evidence that African-Americans were being systematically excluded from jury pools in Berrien County. Therefore, defendant has failed to establish a prima facie case of discrimination, and his claim is without merit.

Defendant additionally claims that defense counsel was ineffective because he was unprepared to provide evidence of systematic exclusion at the motion hearing. Because defendant failed to move for a new trial or request an evidentiary hearing before the trial court with regard to his claim, our review of defendant’s claim is limited to mistakes apparent on the record.¹ *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To prevail on his claim of ineffective assistance of counsel, defendant must show that defense counsel’s performance fell below an objective standard of reasonableness and was so prejudicial that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). He must overcome the strong presumption that counsel’s actions constituted sound trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

Defense counsel may be found ineffective when unprepared for trial. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). However, to succeed on such a claim, defendant must demonstrate “that his counsel’s failure to prepare for trial resulted in counsel’s ignorance of, and hence failure to present, valuable evidence that would have substantially benefited” his case. *People v Bass (On Rehearing)*, 223 Mich App 241, 253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998). Again, defendant provides no admissible evidence to support his claim that African-Americans are underrepresented in jury venires or that African-Americans were being systematically excluded from jury pools in Berrien County. Thus, defendant has failed to demonstrate that defense counsel’s failure to obtain such information resulted in a failure to introduce evidence that would have been valuable to his case. *Bass, supra* at 253. Defendant’s claim of ineffective assistance of counsel is without merit because he has not shown that, but for counsel’s conduct, the outcome would have been different. *Toma, supra*.

¹ Defendant filed a motion in this Court seeking a remand to the trial court for an evidentiary hearing on his claim of ineffective assistance of counsel. A panel of this Court denied the motion. *People v Fuse*, unpublished order of the Court of Appeals, entered February 9, 2009 (Docket No. 285169). The fact that defendant filed a motion in this Court seeking a remand to the trial court does not affect the standard of review. Defendant should have filed a motion in the trial court. See *People v Ginther*, 390 Mich 436,443; 212 NW2d **Error! Not a valid link.**922 (1973).

Defendant next argues that the trial court's restrictions on defense counsel's cross-examination of Sergeant Timothy Sutherland violated his constitutional right to confront witnesses and present a defense. We review this preserved issue for harmless error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A defendant has the right to be confronted with the witnesses against him through cross-examination. US Const, Am VI; *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). "A limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation." *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998). However, neither the Confrontation Clause nor due process confers on a defendant an unlimited right to cross-examine on any subject. *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984). "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986).

Here, the trial court did not, as claimed by defendant, improperly limit defendant in cross-examining Sergeant Sutherland about his motivation to accuse defendant of committing a crime. The trial court only precluded further questioning of whether Sergeant Sutherland's taser certification was up to date, a tangential issue at best, and whether he had previously used force and claimed it was justified. The excluded testimony, was not relevant to the elements of the crime. *People v Ventura*, 262 Mich App 370, 377; 686 NW2d 748 (2004) (lawfulness of the arrest is not an element of resisting and obstructing a police officer). In addition, the testimony was only marginally relevant toward the witness's bias, and therefore, subject to the reasonable limits by the trial court. *Van Arsdall*, *supra* at 679. Finally, defendant was allowed to place before the jury facts from which bias, prejudice, or lack of credibility might be inferred, and he has not shown that he was denied a reasonable opportunity to test Sergeant Sutherland's testimony on a material issue. *People v McPherson*, 263 Mich App 124, 138; 687 NW2d 370 (2004). Defendant has not demonstrated the existence of an error. *Carines*, *supra* at 763-764.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra